PP

v.

VOON LEE SHAN

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[CRIMINAL APPEAL NO: 41-06-2006 III]
22 JUNE 2007

CRIMINAL LAW: *Penal Code - Section 216 - Prevention of arrest - Respondent a counsel acting on behalf of client - Whether the respondent had 'intention' as required by charge - Whether magistrate came to a reasonable conclusion*

The respondent was charged for harbouring one Henderick Tan Boon Kai (Hendrick) with the intention of preventing him from being apprehended thereby committing an offence punishable under s. 216 of the Penal Code. The magistrate at the end of the prosecution case had discharged and acquitted the appellant, resulting in this appeal. The facts were that Hendrick was arrested by the police and brought before a magistrate for remand. The respondent was counsel acting on behalf of Hendrick. The application for remand was unsuccessful and Hendrick was released unconditionally. Upon being released, PW6 instructed PW2 to re-arrest Hendrick. The respondent however prevented the arrest by getting Hendrick hurriedly into his car and sped away. The issues that arose were (1) whether or not the respondent had the intention to prevent the arrest of Hendrick as required under s. 216 of the Penal Code and (2) whether or not the magistrate was correct in his conclusion.

Held (dismissing the appeal):

(1) The magistrate was correct in his finding that the respondent did not have the 'intention' as required by the charge. The respondent was the counsel acting on behalf of Hendrick in an application for remand before a properly constituted judicial proceeding and had been successful in obtaining an unconditional release. *Prima facie*, the respondent as counsel was entitled to enforce a legally obtained order of release and when PW6 attempted to re-arrest Hendrick, it was reasonably on the part of the respondent to assume that the attempt to

re-arrest was illegal. The magistrate had properly 'subject the evidence led by the prosecution in its totality to a maximum evaluation' and came to a conclusion which was a reasonable one. (paras 10 & 15)

Case(s) referred to:
PP v. Badrulsham Baharom [1988] 2 MLJ 585 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2005] MLJU LEXIS 157 ***(refd)***

Legislation referred to:
Penal Code, s. 216

For the appellant - Fazillah Begum Abdul Ghani SFC
For the respondent - Chong Siew Chiang

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

[1] The respondent was charged with the following charge:

> That on the 11th day of July, 2000 at about 11.15 am, at the vicinity of Pejabat Daerah Kota Samarahan in the Samarahan District, in the state of Sarawak, one Hendrick Tan Boon Kai (m) was ordered to be apprehended of an offence punishable under section 302 of the Penal Code by C/Insp. Anot bt. Kian, public servant in exercise of her lawful powers as such public servant, and that you knowing of the said order for apprehension, at the same date, time and place mentioned above, harboured the said Henderick Tan boon Kai, with the intention of preventing him from being apprehended, and that you have thereby committed an offence punishable under section 216 of the Penal Code.

[2] The learned Magistrate at the end of the prosecution case discharged and acquitted the appellant, resulting in this appeal.

[3] The learned Senior Federal Counsel listed six grounds of appeal and after hearing and reading the submissions of counsels, I am of the view that this appeal raises one issue and that is whether or not the respondent had the intention to prevent the arrest of one Hendrick Tan Boon Kai as required under s. 216 of the Penal Code.

[4] Section 216 of the Penal Code reads as follows:

> (1) Whenever any person convicted of, or charged with an offence, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say, if the offence for which the person was in custody, or is ordered to be apprehended, is punishable with death, he shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; if the offence is punishable with imprisonment for life, or imprisonment for ten years, he shall be punished with imprisonment for a term which may extend to three years, with or without fine; and if the offence is punishable with imprisonment for not less than one year but less than ten years, he shall be punished with imprisonment for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.
>
> (2) In this section "offence" includes also any act or omission of which a person is alleged to have been guilty out of Malaysia which if he had been guilty of it in Malaysia would have been punishable as an offence and for which he is under any law relating to extradition or fugitive offences, or otherwise liable to be apprehended or detained in custody in Malaysia and every such act or omission shall for the purpose of this section be deemed to be punishable as if the accused person had been guilty of it in Malaysia.
>
> Exception-This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

[5] The facts were these. One Hendrick Tan Boon Kai (Hendrick) was arrested by the police and brought before a 2nd class Magistrate (the administration officer at Kota Samarahan) on 11 July 2000 for remand. The respondent was the counsel acting on behalf of Hendrick. The application for remand was unsuccessful and Hendrick was released unconditionally. Upon being released, PW6 instructed PW2 to re-arrest Hendrick. The respondent however prevented the arrest by getting Hendrick hurriedly into his car and sped away.

[6] Based on those facts the learned Magistrate made the following findings:

> Unless there is an admission, the intention of the accused can only be inferred by the court from the facts and circumstances surrounding his action.
>
> In this case, the accused was a lawyer for a suspect in a murder case, and his client was subsequently ordered to be released by the presiding Magistrate in a remand proceeding. Immediately after, the police ordered Mr Hendrick to be re-arrested. The accused, who knew of such an order, brought Mr Hendrick Tan away in a car right before the eyes of the police party before dropping him out about 2 miles away. It is also a fact in this case that at the time of the incident, the police station of Kota Samarahan was located in the same vicinity where the whole incident happened ie, right next to the district office building. In view of the circumstances, can this act of the accused be viewed as done with the 'intention of preventing the apprehension of Mr Hendrick Tan?
>
> Upon considering the whole circumstances, it seems to the court that the answer to the above question is in the negative. The reason being, firstly, the act was done in pursuance of a release order made by the Magistrate and with a belief that the order to re-arrest Mr Hendrick Tan was unlawful, and such belief had operated on him as lawful justification to take Hendrick Tan away from the vicinity of the incident. Secondly, the act was done in clear presence of the police party. Given the facts that the police station just next to the district office building when the incident happened, where they should have enough officers and facilities, it is only reasonable to presume that they are in a good position to affect the order of apprehension if they so truly desired, for example, by following the car. However, there was no evidence to show that the police had made any effort to arrest Hendrick Tan after he was taken away by the accused.
>
> Upon considering the facts and circumstances of this case in its totality, the court views that what the accused did on that fateful day is nothing more than an 'aggressive' act of a lawyer in upholding the right and interest of his client in the face of aggressive action by the police. His action, though arguable might be questionable, should not in any way be perceived and judged as a criminal act of harboring a murder suspect with the intention of protecting him from a process of law.

[7] The question before me now is whether or not the learned Magistrate was correct in his conclusion.

[8] Having read the notes of proceedings with utmost care, I came to the conclusion that the learned Magistrate was correct in his finding that the respondent did not have the "intention" as required by the charge. My reasons for my view are these.

[9] Firstly, the learned Magistrate in dealing with the issue of intention cannot be faulted as he followed the approach as stated by Lim Beng Choon J in the case of in *PP v. Badrulsham Baharom* [1988] 2 MLJ 585 at p. 589:

> Knowledge being an element of the state of mind of a person, the obvious question is; how is one to prove the element of knowledge in order to establish possession. However that maybe, certain modes of proof are acceptable as sufficient to distinguish between a genuine and a feigned defence. Those modes of proof are acceptable because unless a defendant confesses that he has the necessary knowledge which is an element of his state of mind such element must be judged from his outward acts or omissions ... (the learned judge quoted from *Chan Pean Leon v. PP* [1956] MLJ 237) ...
>
> ... Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that she has knowledge, or the nature of the thing may be so obvious what it was.

[10] Secondly the respondent was the counsel acting on behalf of Hendrick in an application for remand before a properly constituted judicial proceeding and had been successful in obtaining an unconditional release. *Prima facie*, the respondent as counsel was entitled to enforce a legally obtained order of release and when PW6 attempted to re-arrest Hendrick, it is reasonably on the part of the respondent to assume that the attempt to re-arrest was illegal.

[11] Having said that, this court does not doubt that the police are entitled in law to re-arrest after a failed remand application. However I disagree with the assertion by the learned Magistrate that they are entitled to re-arrest for the same offence. If that is correct, then it would make a farce of all remand applications. What the police should have done was either to file an urgent application for revision to the High Court or file an appeal. They can only re-arrest for another offence which was not dealt with in the failed remand proceeding. This brings me to the next point.

[12] PW6 had stated she wanted to re-arrest Hendrick for another offence under a case report. However there was no police report concerning that complaint produced in court. In my view when there is any attempt to re-arrest after a failed remand application, the burden is on the police to prove that there is in fact another offence alleged to have been committed by the accused. The police had failed to overcome that burden in this case. From the notes there were only two reports produced in court, namely KS/RPT/746/2000 and 440/2004. The former report concerned the respondent while the later concerned the alleged murder offence which Hendrick was arrested for.

[13] I also agree with the learned Magistrate that the respondent could have easily been re-arrested as the incident was in the full view of a police party and next to a police station. There was also no attempt to re-arrest Hendrick after that. They could have organized a police patrol car to chase after the car which Hendrick was in. This failure to do so again raises doubt in my mind as to whether or not the respondent had the "intention" as required in s. 216 of the Penal Code.

[14] Finally let me restate what the duty of the learned Magistrate at the end of the prosecution case is and it is what Gopal Sri Ram JCA said in *Pendakwa Raya v. Mohd. Radzi bin Abu Bakar* [2005] MLJU LEXIS 157:

> For the guidance of the courts below, we summarize as follows the steps that should be taken by a trial court at the close of the prosecution's case:
>
> (i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favorable to the accused;
>
> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "NO" then, a *prima facie* case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. Public Prosecutor* [1963] MLJ 263.

[15] In my view, the learned Magistrate had properly "subject the evidence led by the prosecution in its totality to a maximum evaluation" and came to a conclusion which in my view was a reasonable one.

[16] Accordingly I dismiss this appeal. In respect of the application for the notice of motion by the respondent (encl. 2), it is not necessary in view of my dismissal of this appeal to deal with it, hence the same is struck out.